



**Fourth Court of Appeals**  
**San Antonio, Texas**

**MEMORANDUM OPINION**

No. 04-19-00570-CV

**CITY OF SAN ANTONIO,**  
Appellant

v.

Olga **HURÓN** and Dianna Rico,  
Appellees

From the County Court at Law No. 10, Bexar County, Texas  
Trial Court No. 2019CV05317  
Honorable J. Frank Davis, Judge Presiding

Opinion by: Patricia O. Alvarez, Justice

Sitting: Patricia O. Alvarez, Justice  
Luz Elena D. Chapa, Justice  
Irene Rios, Justice

Delivered and Filed: June 10, 2020

**AFFIRMED AND REMANDED**

David L. Arredondo was struck and killed by a San Antonio Police Department (SAPD) vehicle. Arredondo's sisters sued the City claiming the officer was negligent and the City was liable. The City asserted its immunity from suit for lack of formal or actual notice. The trial court denied the City's plea to the jurisdiction, and the City appeals. Although the City received no formal notice, we conclude it had actual notice of a claim under section 101.101(c) of the Tort Claims Act. We affirm the trial court's order and remand the cause to the trial court.

## BACKGROUND

On May 11, 2018, shortly before midnight, Arredondo was riding his bicycle westbound on Sioux Street. Arredondo failed to stop at a stop sign, and he rode across the unlit intersection. Officer Isaac Botello, driving southwest on Somerset Road, struck Arredondo with his vehicle, and Arredondo died at the scene. The City sent investigators and a supervisor to the scene, and Officer Botello gave a statement regarding the accident. The investigators took photographs and videos, collected evidence, and filed their reports.

Just over thirteen months after the accident, Arredondo's sisters Olga A. Hurón and Dianna A. Rico sued the City for Arredondo's wrongful death. The sisters asserted the officer was negligent and grossly negligent, and the City was liable. The sisters sued individually, and Hurón sued as a representative of the estate of David L. Arredondo.

In its plea to the jurisdiction, the City argued its immunity has not been waived because it did not receive formal notice of the sisters' claims and it had no actual notice of its alleged fault within the notice deadline.

At the hearing on the City's plea, the sisters did not argue or present evidence of formal notice, but they argued the City had actual notice, and they presented evidence to the trial court. The City objected to the sisters' evidence. The trial court sustained the objections in part, but it admitted the City-generated reports. The trial court dismissed the sisters' individual wrongful death claims but denied the City's plea.<sup>1</sup>

In this interlocutory appeal, the City argues the trial court erred. The City insists the sisters failed to provide the formal notice required, and the sisters presented no evidence of the City's

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<sup>1</sup> After the trial court's July 19, 2019 order denied the City's plea but dismissed the sisters' individual wrongful death claims, Hurón filed a fourth amended original petition as the administrator of the estate of David L. Arredondo.

subjective awareness that its alleged fault produced or contributed to Arredondo's death. We begin by reciting the standard of review and requirements to waive the City's immunity from suit.

### **GOVERNMENTAL IMMUNITY**

"Generally, governmental entities are immune from suits seeking to impose tort liability on them." *City of San Antonio v. Tenorio*, 543 S.W.3d 772, 775 (Tex. 2018) (citing *Ryder Integrated Logistics, Inc. v. Fayette Cty.*, 453 S.W.3d 922, 926 (Tex. 2015)).

But for certain circumstances, such as a death caused by the operation of a motor-driven vehicle, *see* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(1), a city's immunity from suit may be waived if the city receives timely notice of the accident under the state's and city's respective requirements, *see Tenorio*, 543 S.W.3d at 775 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 101.101(a) (six-month notice period); SAN ANTONIO, TEX., CITY CHARTER art. XII, § 150 (ninety-day notice period)).

If the plaintiff does not provide the city with formal notice, the city's immunity may still be waived if the city has actual notice within the notice deadline. *See id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 101.101(c); *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995) (per curiam)); *see also Worsdale v. City of Killeen*, 578 S.W.3d 57, 66–67 (Tex. 2019).

### **ACTUAL NOTICE**

"[A]ctual notice exists only when the governmental unit has 'knowledge of (1) a death, injury, or property damage; (2) the governmental unit's alleged fault producing or contributing to the death, injury, or property damage; and (3) the identity of the parties involved.'" *Worsdale*, 578 S.W.3d at 63 (quoting *Cathey*, 900 S.W.2d at 341); *accord Tenorio*, 543 S.W.3d at 776.

"[S]ubjective awareness of alleged fault requires neither adjudication of liability nor confession of fault." *Worsdale*, 578 S.W.3d at 65 (noting that "lack of formal notice is excused only by actual, not constructive, notice"). No "explicit 'confession of fault'" is required. *Id.* at

67. Instead, subjective awareness of alleged fault is established by a fact-based inquiry which considers the totality of the evidence, including circumstantial evidence. *Id.* at 66, 77.

But a governmental unit's subjective awareness of its *potential* fault is not enough to establish actual notice, *Tenorio*, 543 S.W.3d at 779 (citing *id.* at 783 (Guzman, J., dissenting)) (rejecting the dissent's view that "subjective awareness of *potential* fault" supports actual notice). And actual notice does not arise merely "because the governmental unit (1) should have investigated an accident as a prudent person would have, (2) investigated an accident as part of its routine safety procedures, or (3) should have known it might have been at fault based on its investigation." *Tenorio*, 543 S.W.3d at 776; *accord Tex. Dep't of Criminal Justice v. Simons*, 140 S.W.3d 338, 347–48 (Tex. 2004), *superseded by statute on other grounds*, Act of May 25, 2005, 79th Leg., R.S., ch. 1150, § 1, Tex. Gen. Laws 3783, 3783 (codified at TEX. GOV'T CODE ANN. § 311.034), *as recognized in Worsdale*, 578 S.W.3d at 62.

To reiterate, actual notice means "that a governmental unit has subjective awareness that its fault, as ultimately alleged by the claimant, produced or contributed to the claimed injuries." *Tenorio*, 543 S.W.3d at 776; *accord Univ. of Tex. Sw. Med. Ctr. at Dall. v. Estate of Arancibia*, 324 S.W.3d 544, 549 (Tex. 2010); *Cathey*, 900 S.W.2d at 341.

When the evidence is undisputed, "[w]hether a [city] has actual notice . . . is a question of law." *Tenorio*, 543 S.W.3d at 776; *accord Worsdale*, 578 S.W.3d at 66.

#### STANDARD OF REVIEW

"[T]he assertion of . . . governmental immunity implicates the trial court's jurisdiction and may therefore be asserted in a plea to the jurisdiction." *Chambers-Liberty Ctys. Nav. Dist. v. State*, 575 S.W.3d 339, 345 (Tex. 2019); *accord Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004).

To withstand the defendant's plea to the jurisdiction, the plaintiff must plead facts that show the governmental entity's immunity has been waived. *Worsdale*, 578 S.W.3d at 66; *City of San Antonio v. Cervantes*, 521 S.W.3d 390, 394 (Tex. App.—San Antonio 2017, no pet.).

“Where the jurisdictional issue or facts do *not* implicate the merits of the case, and . . . the facts relevant to jurisdiction are undisputed, the court should make the jurisdictional determination as a matter of law based solely on those undisputed facts.” *Univ. of Tex. v. Poindexter*, 306 S.W.3d 798, 806 (Tex. App.—Austin 2009, no pet.) (citing *Miranda*, 133 S.W.3d at 228); *cf. Cervantes*, 521 S.W.3d at 394 (observing that the question of notice in that case “[did] not involve any significant inquiry into the merits of the lawsuit”). “The trial court [is] required to consider the relevant evidence submitted by the parties and then resolve the jurisdictional issue on the basis of the facts it found or those that [are] undisputed.” *Cervantes*, 521 S.W.3d at 394; *accord Poindexter*, 306 S.W.3d at 806. “When a trial court does not issue findings of fact and conclusions of law with its . . . ruling, all facts necessary to support the [order] and supported by the evidence are implied.” *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002).

“[W]hen the jurisdictional issue is not intertwined with the merits, we must defer to the trial court's express or implied factual determinations that are supported by sufficient evidence.” *Worsdale*, 578 S.W.3d at 66. But “[o]n appeal, any fact findings made to resolve the jurisdictional issue may be challenged, as any other fact findings, for legal and factual sufficiency.” *Poindexter*, 306 S.W.3d at 806 (citing *BMC Software*, 83 S.W.3d at 795).

We review de novo the trial court's determination of its subject matter jurisdiction. *City of Dallas v. Carbajal*, 324 S.W.3d 537, 538 (Tex. 2010) (citing *Miranda*, 133 S.W.3d at 226).

#### **PARTIES' ARGUMENTS**

The City asserts its immunity has not been waived because it did not receive formal notice under subsections 101.101(a) or (b); it also insists that it did not have actual notice of the sisters'

claims until they filed suit—more than one year after the accident. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.101(a),(b).

The sisters did not argue or provide evidence of their formal notice to the City under subsection 101.101(a) or (b). *See id.* Instead, they contend the City had actual notice, the City's immunity from suit has been waived, and the trial court has jurisdiction to hear their claims.

### ANALYSIS

We begin with the parties' respective pleading and evidence burdens.

#### **A. Sisters' Pleadings, Prima Facie Case**

In their second amended original petition, the sisters alleged the City had actual notice of their claim because the City knew (1) that Arredondo had been struck and killed, (2) the City's (SAPD) vehicle was operated negligently when it struck Arredondo, and (3) the identity of the officer and the decedent. *See Worsdale*, 578 S.W.3d at 62–63 (three actual notice elements).

We conclude the sisters met their burden to plead facts that show the City's immunity was waived. *See Worsdale*, 578 S.W.3d at 66; *Cervantes*, 521 S.W.3d at 394.

#### **B. City's Evidence Challenging Jurisdiction**

In its responsive plea to the jurisdiction, the City challenged only one of the three essential elements for actual notice: it asserted that it had no subjective awareness of its alleged fault in producing or contributing to Arredondo's death. *See Worsdale*, 578 S.W.3d at 63 (elements); *Tenorio*, 543 S.W.3d at 776 (same). To conclusively disprove the subjective awareness of its alleged fault element, the City produced evidence including an affidavit from the City's Claims Manager Henry Ruiz.

##### *1. Claims Manager's Affidavit*

Ruiz averred that the City did not receive written notice of a claim against the City within ninety days of the accident. *Contra* TEX. CIV. PRAC. & REM. CODE ANN. § 101.101(b) (applying

charter notice deadlines); SAN ANTONIO, TEX., CITY CHARTER art. XII, § 150 (setting a ninety-day notice period); *Tenorio*, 543 S.W.3d at 775 (“Claimants must also comply with any proper time requirements for notice that a city has adopted by charter or ordinance.”). Ruiz further averred that the first notice the City had of the sisters’ claims was when the City was served with the sisters’ original petition, on July 1, 2019, more than one year after the accident.

2. *Texas Peace Officer’s Crash Report*

The City also produced a copy of the Texas Peace Officer’s Crash Report. The report, prepared by an SAPD investigator, identifies the officer driving the SAPD vehicle, the decedent, the location, and other facts pertaining to the accident. The report identifies Officer Botello as DRIVER 1, the SAPD vehicle as UNIT 1, and Arredondo as the rider of UNIT 2. The investigator’s narrative reads in its entirety as follows:

UNIT 1 was traveling southbound in the 7300 block of Somerset Rd. The UNIT 1 was in the left lane. UNIT 2 was traveling westbound on Sioux. UNIT 2 disregarded the stop sign for Sioux and rode into the intersection. UNIT 1 struck the UNIT 2 in the intersection. The rider of UNIT 2 was ejected from his bicycle and pushed into the mailbox at 7411 Somerset. DRIVER 1 stopped his vehicle and attempted to help the rider of UNIT 2. The rider of UNIT 2 died at the scene. EMS officer [name omitted] pronounced the rider of UNIT 2’s death at 2345 hours. At the time of the crash, the rider of UNIT 2 was wearing blue jeans and a red flannel shirt. The intersection has minimal lighting. TID responded to process the scene.

Under “Contributing Factors,” the report lists only Unit 2 as a contributing factor. It does not list Unit 1, Officer Botello, or any other unit or person as a contributing factor in the accident.

The trial court’s responsibility was “to consider the relevant evidence submitted by the parties and then resolve the jurisdictional issue on the basis of the facts it found or those that [are] undisputed.” *Cervantes*, 521 S.W.3d at 394; *accord Poindexter*, 306 S.W.3d at 806.

### **C. Sisters' Evidence of Actual Notice**

At the hearing on the plea to the jurisdiction, the sisters offered Plaintiffs' Exhibit 1, a compilation of documents. The City objected to all the documents except the Texas Peace Officer's Crash Report, but the trial court admitted the following documents:<sup>2</sup>

- Texas Peace Officer's Crash Report
- Vehicle Accident Report or Loss Notice
- KSAT.com website page printout
- Crime Scene Search Report printout for "City Vehicle Accident"
- Crime Scene Search Report printout for "CITY VEHICLE CRASH—FATALITY"
- Work Order Report WO# 0001257756
- Attorney General's letter of September 20, 2018 to Ms. Agatha Wade, Assistant Criminal District Attorney for Bexar County
- Open Records Portal request printout for May 28, 2019
- Office of the City Attorney of San Antonio letter of May 28, 2019

### **D. Putative Evidence of City's Subjective Awareness of Its Fault**

We review the documents for evidence of the City's subjective awareness of its alleged fault in producing or contributing to Arredondo's death. *See Tenorio*, 543 S.W.3d at 776. We may conclude the City had subjective awareness of its alleged fault without its express confession of fault, *see Worsdale*, 578 S.W.3d at 67, and we consider all the facts, including any facts disclosed in the City's investigations, *see id.* at 68. We consider each document as part of the totality of the evidence, *see id.*, but because Officer Botello's statement and the related evidence are sufficient to support the trial court's implied finding, we need not discuss each document in detail.

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<sup>2</sup> The City raised hearsay objections to the all of Plaintiffs' Exhibit 1 (except for the Texas Peace Officer's Crash Report) and relevance objections to other parts of the exhibit. The trial court sustained the relevance objections and excluded certain documents, but it admitted the remaining documents. The City does not challenge the trial court's evidentiary rulings on appeal, and we will consider all the documents the trial court admitted, but we will not consider any of the documents the trial court excluded.

1. *Texas Peace Officer's Crash Report*

The only finding of fault in the Texas Peace Officer's Crash Report points to Arredondo. The narrative states that Arredondo "disregarded the stop sign for Sioux [Street] and rode into the intersection [where the SAPD vehicle] struck [Arredondo]." The report shows the sole contributing factor as Unit 2—meaning Arredondo. *Cf. Carbajal*, 324 S.W.3d at 539.

2. *Crime Scene Case Reports*

The City conducted an extensive investigation, and its Crime Scene Investigators (CSIs) produced two Crime Scene reports. The first CSI's report states the investigator took 259 digital photographs, took custody of Arredondo's bicycle, and marked the items as evidence. The second CSI's report states the investigator video recorded the scene including the medical examiner's preliminary examination. Neither report gives any indication of fault by any party, and we do not infer that the City gained any subjective awareness of its alleged fault merely because it conducted an extensive investigation. *See Worsdale*, 578 S.W.3d at 64. Contrary to the sisters' arguments, we cannot read *Worsdale* to support the proposition that a wide-ranging investigation that shows no fault on a governmental defendant's part provides the defendant with actual notice merely because it was a wide-ranging investigation. *Cf. id.* It is the facts disclosed in the investigation, not the breadth of the investigation alone, that inform the actual notice question. *Cf. Tenorio*, 543 S.W.3d at 776 ("If a governmental unit investigates an accident, whether the information acquired through its investigation meets the actual notice requirements of the TTCA depends upon the particular facts of the case.").

3. *Vehicle Accident Report*

The actual notice question is primarily informed by the facts in the Vehicle Accident Report or Loss Notice, which was completed by Officer Botello. In it, he notes the time of the accident was 11:37 pm, and the road conditions were "dry, dark, and unlit." Botello reported "I

was traveling [southwest] in the #1 lane of Somerset [Road], when I felt something strike my vehicle. I immediately noticed my windshield was damaged and [I] came to an immediate stop.” Botello observed Arredondo lying in the street. Botello called for “medical assistance, additional patrol units, a supervisor, and CSI to [the] scene.”

### **E. Evidence of City’s Subjective Awareness of Its Fault**

The central question before us is whether the evidence supports the trial court’s implied finding “that [the City] ha[d] subjective awareness that its fault, as ultimately alleged by the claimant, produced or contributed to the claimed injuries.” See *Tenorio*, 543 S.W.3d at 776; *Univ. of Tex. Sw. Med. Ctr. at Dall. v. Estate of Arancibia*, 324 S.W.3d 544, 549 (Tex. 2010); *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995) (per curiam). We briefly review the applicable law.

#### *1. Duty to Keep a Proper Lookout*

“All persons have the duty to maintain a proper lookout and to observe in a careful manner the traffic and general situation at and in the vicinity of an intersection.” *Gomez v. Adame*, 940 S.W.2d 249, 251 (Tex. App.—San Antonio 1997, no writ); accord *Montes v. Pendergrass*, 61 S.W.3d 505, 509 (Tex. App.—San Antonio 2001, no pet.). “[A] proper lookout encompasses the duty to observe, in a careful and intelligent manner, traffic and the general situation in the vicinity, including speed and proximity of other vehicles as well as rules of the road and common experience.” *Montes*, 61 S.W.3d at 509 (alteration in original) (quoting *Carney v. Roberts Inv. Co.*, 837 S.W.2d 206, 211 (Tex. App.—Tyler 1992, writ denied)).

#### *2. Evidence of Proper Lookout*

Officer Botello’s statement is a very brief summary of the accident. It does not list his speed at the time of the accident or allege other facts to show that Botello was observing, “in a careful and intelligent manner, traffic and the general situation in the vicinity [of the intersection], including speed and proximity of other vehicles” such as Arredondo on his bicycle. *Contra*

*Montes*, 61 S.W.3d at 509. To the contrary, Officer Botello reported that he “felt something strike [his] vehicle [and he] immediately noticed [his] windshield was damaged.” Botello did not state that he observed the intersection before he entered it or that he saw Arredondo transiting the intersection before his vehicle struck Arredondo. Officer Botello did not state that he saw Arredondo but tried unsuccessfully to avoid him or allege other facts to show he (Botello) was keeping a proper lookout. *See id.* Additionally, there is no evidence from the investigative reports of skid marks, indicating sudden braking, to show that Botello observed Arredondo transiting the intersection and attempted to stop his vehicle before it struck Arredondo.

3. *City’s Subjective Awareness of Its Fault*

From this evidence, the trial court could have found that Botello did not see Arredondo before Botello’s vehicle struck Arredondo, and it could have concluded that Botello was failing to keep a proper lookout in violation of his duty. *See id.* The City had the evidence, including Botello’s statement and the reports from its investigation, within days of the accident, well within the notice period. *See Tenorio*, 543 S.W.3d at 775 (recognizing the City of San Antonio’s charter’s ninety-day notice period); *see also Worsdale*, 578 S.W.3d at 66–67 (recognizing that actual notice must be acquired within the applicable notice deadline). From the evidence, the trial court could have concluded that the City had timely, subjective awareness of its alleged fault in Arredondo’s death. *See Worsdale*, 578 S.W.3d at 66 (recognizing that subjective awareness may be proved by circumstantial evidence).

We recognize that the Texas Peace Officer’s Crash Report and the CSI reports do not indicate any fault by Officer Botello. But neither these documents, nor the other documents

admitted by the trial court, negate the evidence the City had that indicated Officer Botello was not keeping a proper lookout at the time of the accident.<sup>3</sup>

### CONCLUSION

Although the City received no formal notice within the ninety-day notice period, the evidence is sufficient to support the trial court's implied finding that the City had actual notice within the notice period. The results of the City's investigation included legally sufficient evidence to support a finding that Officer Botello was not maintaining a proper lookout at the time of the accident, and the investigation's results gave the City timely notice of its fault, as ultimately alleged by the sisters, in producing or contributing to Arredondo's death. We conclude the City had actual notice of a claim under section 101.101(c) of the Tort Claims Act.

We overrule the City's sole issue, affirm the trial court's order denying the City's plea to the jurisdiction, and remand the cause to the trial court for further proceedings.

Patricia O. Alvarez, Justice

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<sup>3</sup> Our review is limited to the threshold jurisdictional question—whether the evidence was sufficient to support the trial court's implied finding that the City had subjective awareness of its fault within the notice period such that it was proper for the trial court to deny the City's plea to the jurisdiction. See *LTTS Charter Sch., Inc. v. C2 Const., Inc.*, 358 S.W.3d 725, 733 (Tex. App.—Dallas 2011, pet. denied) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8)). We make no finding or conclusion on the City's ultimate liability, if any, in the accident.